COURT OF APPEALS
DECISION
DATED AND RELEASED

April 15, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-0380-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT 1

State of Wisconsin,

Plaintiff-Respondent,

v.

Ashanti D.,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Ashanti D. appeals from a judgment of conviction after a jury found him guilty of first-degree sexual assault of a child. He also appeals from an order denying his motion for postconviction relief. He raises three issues for review: (1) whether the trial court committed prejudicial error when it allowed the State to amend the information and when it failed to grant his request for an adjournment afterward;

(2) whether the trial court erred when it denied his postconviction motion premised on an ineffective assistance of counsel claim; and (3) whether this court should grant a new trial in the interests of justice. We reject his arguments on these issues and affirm.

Police arrested Ashanti D. for sexually assaulting his eleven-year-old cousin.[1] The victim told police that she was lying on her bed when Ashanti D. removed her clothes and his pants and then penetrated her vagina with his penis. The criminal complaint and original information filed by the State alleged that the assault occurred on May 8, 1994. On the afternoon of Ashanti D.'s jury trial, the State moved the trial court to amend the information so that it alleged that the assault occurred "on or about" May 8, 1994. Ashanti D. objected to the amendment, arguing that his defense was premised on a defense limited to the original date of May 8, or Mothers Day, and that if the court allowed the amendment, his defense would be prejudiced. He argued that at a minimum the trial court should grant an adjournment or recess so that he could discuss and prepare possible alibis for the additional days that he would have to account for at trial.

The trial court stated that the amendment would not prejudice Ashanti D., because among other things, the issues in the case were "certainly not going to boil down to simply a date, and if it does, it will be a date in May based on what both parties have indicated to the Court." Further, the court ruled:

> I don't see that any prejudice has been caused by alleging that this offense occurred on or about May 8th with the State providing more specificity in its definition of that time frame to be somewhere between the 6th and 8th of May of 1994.

[1] Although the defendant is an adult, we refer to him as Ashanti D. in order to protect the identity of the juvenile victim. Further, the defendant's given name is alternatively spelled "Ashanti" and "Ashante" throughout the record. On remittitur we direct the clerk of courts to determine the correct spelling of the defendant's name and then amend the judgment of conviction if necessary.

> There's not been any suggestion that the witnesses, the place, the circumstances of the fact pattern in this case have been altered in any way, and with that, the Court will allow the State to amend this Information to recite that the offense occurred on or about May 8th, 1994, and it is so ordered.

The case proceeded to a jury trial. The victim's grandmother testified for the State and among other things stated that Ashanti D. was present in her home on May 6 and 7; this supported the State's version of when and where the assault occurred. Later, Ashanti D. testified and denied all of the allegations.

After jury deliberations began and before the verdict was returned, Ashanti D.'s trial counsel became aware that the victim's grandmother indicated that she had been mistaken and that she had testified erroneously when she said that Ashanti D. was present in her home on May 6 and 7. Trial counsel informed the prosecutor and the trial court, but the trial court declined to take any action until the jury returned a verdict. The jury then found Ashanti D. guilty as charged, and counsel moved to set aside the verdict based on the alleged recantation of the witness's testimony. The trial court denied the motion and the judgment of conviction was entered.

Five days after the trial, Ashanti D. then moved the trial court for a mistrial or in the alternative an evidentiary hearing so he could establish the witness's testimony. The trial court sentenced Ashanti D. to five years in prison. Ashanti D. then filed a postconviction motion alleging ineffective assistance of trial counsel. The trial court held an evidentiary hearing, *see* ***State v. Machner,*** 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979), at which trial counsel testified. After the hearing, the trial court denied the motion, concluding that Ashanti D. did not receive ineffective assistance of trial counsel. This appeal follows.

Ashanti D. first argues that the trial court erroneously exercised its discretion when it allowed the State to amend the information on the day of the trial. We

disagree because Ashanti D. has not established how he was prejudiced by the amendment.

Whether to allow amendment of an information is a matter within the discretion of the trial court. ***State v. Frey,*** 178 Wis.2d 729, 734, 505 N.W.2d 786, 789 (Ct. App. 1993). Accordingly, "[w]e will not reverse the trial court's decision to allow an amendment absent an erroneous exercise of discretion." ***Id.***

Section 971.29, STATS., permits an amendment of "'the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced, including the right to notice, speedy trial, and the opportunity to defend.'" ***State v. Webster,*** 196 Wis.2d 308, 318, 538 N.W.2d 810, 814 (Ct. App. 1995) (citation omitted). "The key factor in determining whether an amended charging document prejudiced the defendant is whether the defendant had notice of the nature and cause of the accusations against him. There is no prejudice when the defendant has such notice." ***State v. Flakes,*** 140 Wis.2d 411, 419, 410 N.W.2d 614, 617 (Ct. App. 1987).

Ashanti D.'s principal argument is that, given the late amendment of the information, he did not have the notice to prepare a proper defense to the charge. His defense at trial was premised on a complete denial that he engaged in the criminal conduct. We conclude that he has not shown the necessary prejudice arising out of the late amendment.

> When informing the accused, the time frame in which the crime allegedly occurred is one of the underlying facts that should be provided. Where, however, the date of the commission of the crime is not a material element of the crime charged, it need not be precisely alleged. Time is not of the essence in sexual assault cases. This is especially so in cases involving children of tender years. Due to the vagaries of a child's memory, a more flexible application of notice requirements is both required and permitted.

State v. Stark, 162 Wis.2d 537, 544-45, 470 N.W.2d 317, 320 (Ct. App. 1991) (citations omitted). Accordingly, given the nature of the sexual conduct alleged, amending the information from a specific date of May 8, to a slightly broader time of "on or about" May 8, does not on its face offend the notice requirements. Although Ashanti D. alleges that he was not able to prepare an alibi for the expanded timeframe, he never indicated that he was proffering an alibi defense prior to the trial date. Moreover, he never presented an alibi during the postconviction motions on this issue. *See* ***id***. at 548, 470 N.W.2d at 321 (defendant alleging prejudice from amendment of information never produced "any evidentiary hypothesis for an alibi," thus, any error was harmless). In sum, we conclude that Ashanti D. never presented any evidence that suggested that the late amendment to the information prejudiced his right to notice or his ability to prepare a defense. Accordingly, the trial court properly exercised its discretion when it permitted the amendment of the information.

He next contends that the trial court erred when it denied his claim of ineffective assistance of counsel. We disagree.

For a defendant to succeed in an ineffective assistance of counsel claim, the two-pronged test set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984), must be satisfied. A defendant must show that counsel's performance was both deficient and prejudicial. ***Id.*** at 687. If a defendant fails to show one prong, this court need not address the other prong. *See* ***State v. Sanchez,*** 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996). To show that counsel's performance was deficient, a defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland,*** 466 U.S. at 687.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved

> unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Id. at 689. Because of the difficulties in making such a post hoc evaluation, "the court should recognize that counsel is *strongly presumed* to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." ***Id***. at 690.

In reviewing the trial court's decision, we accept its findings of fact, its "'underlying findings of what happened,'" unless they are clearly erroneous, while reviewing "the ultimate determination of whether counsel's performance was deficient and prejudicial" *de novo*. ***State v. Johnson***, 153 Wis.2d 121, 127-28, 449 N.W.2d 845, 848 (1990).

Ashanti D. alleged in his postconviction motion that he received ineffective assistance of counsel based on three instances of his counsel's conduct. On appeal, he only challenges the trial court's ruling on one of these issues; accordingly, we deem any claim based on the remaining two issues abandoned. *See* ***State v. Flynn,*** 190 Wis.2d 31, 39 n.2, 527 N.W.2d 343, 346 n.2 (Ct. App. 1994) (issue raised but never briefed is deemed abandoned) (citation omitted), *cert. denied*, 115 S. Ct. 1389 (1995). Ashanti D. contends that his counsel did not properly prepare or interview the victim's grandmother who later recanted her testimony on the day Ashanti D. was in her home. He also contends that although counsel raised the witness's recantation in after-verdict motions, he never followed up on these motions. He argues that these actions prejudiced him.

The trial court held an evidentiary hearing where trial counsel testified, as well as the allegedly recanting witness. At the conclusion of the hearing, the trial court rejected Ashanti D.'s ineffective assistance of counsel claim. The trial court found that counsel investigated the case for three months "and it was not until the date of trial that

he learned some information about the case when the witnesses were testifying." The trial court then concluded that, "there's nothing in this record to suggest that [counsel] hadn't done everything he could do as a lawyer or a reasonable lawyer could do with the information he had," and further, that "[t]here's nothing in the record to suggest that [counsel] failed to exercise his duty as trial counsel and prepare as any reasonable lawyer would have done under the circumstances." Thus, the trial court concluded that counsel's performance was not deficient under ***Strickland***. We agree.

Counsel testified that Ashanti D. had told him that he was present at the witness's house the weekend after the assault occurred. Counsel also testified that his investigator had interviewed the witness before the trial, that counsel spoke to the witness shortly before trial, and that the witness confirmed the information that she had given to the investigator–namely, that Ashanti D. had been at her house the weekend after the assault occurred. Further, counsel reviewed the relevant dates with the witness, using a funeral program from the weekend after the assault occurred, and that they "seemed to be on the same page, so to speak." Counsel then testified that he was surprised when the witness then testified that Ashanti D. was at her home the date the assault occurred.

From this testimony, it is clear that counsel had reasonably prepared for the witness's testimony and that there was nothing he could have reasonably done prior to trial that would have altered the examination of the witness. All of the information that counsel had prior to trial suggested that the witness would testify consistent with the information she gave to both counsel's investigator and counsel. In short, Ashanti D. has not shown how counsel's performance was constitutionally deficient under ***Strickland***.

Finally, Ashanti D. asks this court to exercise our power of discretionary reversal under § 752.35, STATS., and grant him a new trial. The crux of his claim is that the jury never heard the witness's alleged recantation of her testimony, and that this

undermined the confidence in the jury's verdict. We decline to exercise our discretionary power of reversal. We cannot conclude that the real controversy was not fully tried or that there was a miscarriage of justice merely because the jury never heard the witness's alleged recantation of the date Ashanti D. was in her home. *See* § 752.35, STATS. First, there were other witnesses placing the defendant in the victim's home when the assault occurred. Further, the State correctly pointed out on the motion to set aside the verdict that the witness's recantation was unreliable because it was prompted or procured by a conversation between the witness and Ashanti D.'s father. Ashanti D. has not established that this is a case requiring the exceptional use of our power of discretionary reversal.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.